No. 77-646

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES D. BRAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 556 F. 2d 1312.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 5, 1977. A petition for rehearing was denied on October 4, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on November 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warrant issued to search petitioner's residence was supported by probable cause.

2. Whether petitioner was deprived of due process by the death of a witness during the 20-month period between the offense and the indictment.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of possession of cocaine hydrochloride with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to 10 years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that on July 23, 1974, an ambulance and police officers were dispatched to 500 Laura Lee Drive, Tallahassee, Florida, to assist a drug overdose victim (Tr. 19-20, 32-33).[2] When Officer George Greene and the ambulance attendants arrived, they observed petitioner lying unconscious on the floor of the living room, surrounded by his wife and brothers, James and David Brand (Tr. 33). Officer Greene also noticed hypodermic needles, marijuana butts, and several pills in the living room (Tr. 34, 63-65). As petitioner was being placed in the ambulance, Officer Wayne Crawley arrived at the residence (Tr. 27). Petitioner's wife and James Brand went to the hospital with petitioner, while David Brand remained at the house with the officers (Tr. 34). Officers Crawley and Greene then entered one of the bedrooms and found more hypodermic needles, pills,

[1]Co-defendant Nannie Ruth Brand, petitioner's wife, was acquitted (Tr. 177).

[2]"Tr." and "H. Tr." refer, respectively, to the trial transcript and the transcript of the June 1, 1976, hearing on petitioner's motion to dismiss the indictment. "R." refers to the record in the court of appeals.

powdered substances and blood stains around a table and on a needle (Tr. 28-29). Officer Crawley immediately summoned Walter Beck, a narcotics investigator (Tr. 29, 37).

When Officer Beck arrived, numerous pills, pill bottles, injection bottles, and syringes were in plain view on a table in the living room (Tr. 38, 53-55). Officer Beck spoke with David Brand, who stated that petitioner had probably reacted to the cocaine that they had been using. David Brand also told the officer that the cocaine was part of a shipment petitioner had just received and stored in the attic of the house (Tr. 60). Based on this information and his personal observations, Officer Beck procured a warrant to search the house (Tr. 38). The search executed pursuant to the warrant disclosed a pound to a pound and a half of cocaine concealed in a thermos bottle, syringes, foreign currency, and $10,670 in cash (Tr. 40, 42-43, 45-46, 89-95, 100).

2. Petitioner and his wife were arrested on July 23, 1974, for possession of cocaine, in violation of Florida law (H. Tr. 9-10). In February 1975, however, after the evidence seized from petitioner's residence had been suppressed by the state court on the basis of a facial defect in the search warrant affidavit, the state prosecutor dismissed the charges (H. Tr. 69).[3] Petitioner and Mrs.

[3]The state court apparently suppressed the evidence on the basis of an earlier decision that was subsequently overturned on appeal. See H. Tr. 70-73. According to the state prosecutor, the case was dismissed because he believed appeal of the suppression ruling would be unsuccessful. The case was thereafter referred to the United States Attorney in October or November 1975 (H. Tr. 69, 74-75; 1 R. 30-31). There had been no federal involvement during the pendency of the state prosecution because of the federal government's policy against dual prosecution absent extraordinary circumstances (1 R. 23).

Brand were subsequently indicted by a federal grand jury on the instant charges on March 11, 1976. On April 30, 1976, they filed a motion to dismiss, alleging, *inter alia*, that they had suffered actual prejudice due to the death of petitioner's brother, David Brand, during the 20-month period between discovery of the offense and the federal indictment (1 R. 12-14).

At the evidentiary hearing on the motion, petitioner's wife attempted to establish the materiality of David Brand's testimony to an effective challenge to the admission of the cocaine by testifying that, prior to his death, David had told her that the police officers had searched the house before obtaining a warrant (H. Tr. 19-20). In addition, the state prosecutor was cross-examined on this point (H. Tr. 100-103):

> Q. Would you not consider David Brand an important witness in this case?
>
> A. It depends upon the—whether or not you're interested in the search warrant. Probably what the law enforcement officers saw on the scene would have been sufficient to issue a warrant.
>
> I think the information by David Brand would have been certainly helpful, and would have bolstered and may be extremely important.
>
> * * * * *
>
> Q. And David Brand is a material witness both as to the search warrant and as to probable cause for the search warrant, is he not?
>
> A. He is supplemental in the search warrant and based upon what he is recorded as saying in the search warrant he would be a helpful witness for the government, yes sir.

> Q. Is it not true that the officers got into the house to start with because of David Brand's consent and particularly the areas where they found things in plain view?
>
> A. I think the officers got into the house when they went in with the ambulance attendants to remove those persons [sic] o.d.'d in the house.
>
> Q. But he didn't see anything on that trip?
>
> A. Apparently they saw drugs on plain view on the table.

In that context, the federal prosecutor acknowledged (H. Tr. 103) that David Brand "would be an important witness for the Defense purposes." However, he further stated (H. Tr. 127-128):

> We don't feel that he would be as important perhaps as [defense counsel] has alleged in that at the time that the officers and the ambulance attendants gained entry into the house, both James Brand and Mrs. Brand were also present.

Following the hearing, on June 3, 1976, the district court denied the motion to dismiss (1 R. 30-34), observing that although the government attorney had conceded the potential importance of David Brand's testimony, he had "also pointed out that David Brand's testimony would not be as crucial as [alleged], since both [petitioner's wife] and James Brand (another brother of [petitioner]) were also present in the home when entry was made" (1 R. 33).

ARGUMENT

1. Petitioner challenges the validity of the warrant authorizing the search of his house.

a. Petitioner first contends (Pet. 13-15) that the affidavit submitted in support of the search warrant did not establish probable cause. The affidavit (see Pet. App. A-3) was based upon the personal knowledge of Officer Beck, who stated that at 3:48 a.m. on July 23, 1974, he had been dispatched to petitioner's residence to respond to a drug overdose case, that he had observed pills and syringes at the residence, and that David Brand, a guest at the residence, had informed him that there was a large quantity of cocaine in the house.[4]

Although the court of appeals found that Officer Beck's "affidavit contain[ed] no information with which the magistrate could independently evaluate the reliability of David, the informant" and therefore that "David's hearsay assertion [could not] support the search warrant by itself" (Pet. App. A-12, A-13), the court nonetheless concluded that the warrant was issued upon probable cause since "the hearsay was corroborated by an independent police investigation" (*id.* at A-13). We question whether David Brand's statement to Officer Beck should be tested by the standards of *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410. Those cases were concerned with information provided to

[4]The affidavit also related Officer Beck's observation of "narcotics and dangerous drugs[,] * * * prescription bottles * * * and other narcotic paraphernalia" in the house (Pet. App. A-3). Although the court of appeals found that Officers Greene and Crawley had lawfully entered the living room in response to the emergency call and had therefore properly observed the marijuana butts, pills and hypodermic needles in plain view, the court also concluded that the medical emergency did not justify their entry into petitioner's bedroom. Because the officers apparently moved to the living room a number of items they saw in the bedroom prior to Officer Beck's arrival (Pet. App. A-14), the court excluded consideration of those items for purposes of determining probable cause (*id.* at A-15 and n. 11).

police by confidential, paid informants, and several courts have suggested that their holdings should not be extended to other contexts. See, *e.g.*, *United States* v. *Swihart*, 554 F. 2d 264, 268-269 (C.A. 6); *United States* v. *Rueda*, 549 F. 2d 865, 869 (C.A. 2); *United States* v. *Rollins*, 522 F. 2d 160, 164 (C.A. 2), certiorari denied, 424 U.S. 918; *United States* v. *Darensbourg*, 520 F. 2d 985, 988-989 (C.A. 5); *United States* v. *McCoy*, 478 F. 2d 176, 179 (C.A. 10), certiorari denied, 414 U.S. 828. Moreover, the statement was reliable because it was against David's penal interest. See *United States* v. *Harris*, 403 U.S. 573, 583.

In any event, as the court below held, even if the affidavit is appraised without reliance upon David's information, it sets forth facts supporting the issuance of the warrant. Officer Beck, in responding to a drug overdose emergency, personally observed hypodermic needles and other evidence of drug activity in plain view in the living room of the residence. This justified a reasonable belief that narcotics were probably on the premises, and the warrant was properly issued to search for "narcotics and dangerous drugs" (1 R. 38).

b. Petitioner also suggests (Pet. 11-13) that the affidavit was tainted by Officer Beck's observations because they were the product of an illegal search. Petitioner does not contest that Officer Greene entered his residence lawfully in response to the medical emergency, but he argues that once that emergency had terminated, Officer Beck had no right subsequently to enter the house absent a warrant. The court of appeals correctly answered this claim (Pet. App. A-11 to A-12; citations and footnote omitted):

> The [Fourth] amendment protects the citizen against invasion of privacy. Once that interest is invaded legally by an official of the State, the citizen has lost

> his reasonable expectation of privacy to the extent of the invasion. * * * [A]dditional investigators or officials may therefore enter a citizen's property after one official has already intruded legally. * * * Later arrivals may join their colleagues even though the exigent circumstances justifying the initial entry no longer exist. * * * Thus, the validity of the affidavit is not vitiated by the late entry of the affiant * * *.

See *Steigler* v. *Anderson*, 496 F. 2d 793, 797-798 (C.A. 3), certiorari denied, 419 U.S. 1002; *United States* v. *Green*, 474 F. 2d 1385, 1390 (C.A. 5), certiorari denied, 414 U.S. 829.

Contrary to petitioner's contention (Pet. 12), the decision below does not conflict with *United States* v. *Birrell*, 470 F. 2d 113 (C.A. 2). In *Birrell*, evidence legally seized in a state murder investigation subsequently came to the attention of federal authorities through a news story. A federal prosecutor obtained permission to examine the evidence from state officials, who advised that the owner had demanded return of the property. Under those facts, the court held that the owner "had sufficiently manifested his claim that a search by law enforcement officers of another sovereign for a different purpose could not be made without a warrant" (470 F. 2d at 117). Here, by contrast, both the initial and subsequent intrusions were made by agents of the same sovereign involved in the identical investigation, law enforcement agents were continuously present in the residence during the period of the searches, and the evidence had not been removed from petitioner's house, nor had a demand been made for its return. See *United States* v. *DeBerry*, 487 F. 2d 448, 451 and n. 4 (C.A. 2).[5]

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[5]For the same reasons, this case is distinguishable from *Michigan* v. *Tyler*, No. 76-1608, argued January 10, 1978.

2. Petitioner contends (Pet. 6-11) that the government's concession at oral argument on his motion to dismiss that David Brand "would be an important [defense] witness" established actual prejudice to his defense occasioned by the pre-indictment delay. As noted above, however, petitioner has misconstrued the extent of the government's concession. The statement was made during the course of petitioner's attempt to elicit the state prosecutor's opinion whether David Brand's testimony would have borne significantly on the lawfulness of the initial entry and subsequent search of the bedroom (see H. Tr. 100-103). In that context, the Assistant United States Attorney conceded that David's testimony would have been important, but he quickly emphasized that its importance was decreased substantially by the fact that both Mrs. Brand and James Brand had also been present when the officers first entered the residence (H. Tr. 127-128).[6] Moreover, the subsequent search of the bedroom was irrelevant, because items observed there by Officers Green and Crawley were not essential to support the magistrate's finding of probable cause.[7] As the court of appeals noted (Pet. App. A-9; footnote omitted):

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[6]Defense counsel conceded at the hearing that James Brand would be available as a trial witness (H. Tr. 17). The fact that David Brand was alive at the time of the state suppression hearing (his death was contemporaneous with the return of the federal indictment) but apparently was not called to testify in that proceeding undermines the suggestion that his testimony was in fact vital to litigation of the lawfulness of the same search in the federal case.

[7]See note 4, *supra*. Even if petitioner could have established that he suffered actual prejudice as a result of the pre-indictment delay, his Fifth Amendment claim still could not have succeeded because there was no suggestion, much less a finding, that the delay was undertaken in bad faith or for any improper motivation. See note 3, *supra*: *United States* v. *Lovasco*, 431 U.S. 783. Indeed, in the court of appeals petitioner specifically disclaimed any allegation of bad faith on the part of the federal government (see Ct. App. Br. 17).

David's presence would not seem to add significantly to [petitioner's] arguments. The conviction was based primarily on the cocaine that the police seized in [petitioner's] residence. Because David remained at the house during the search, he could testify as to the circumstances relating to the discovery of the cocaine. His testimony could defeat the validity of the warrant only if he could convince the district court that he had not told Officer Beck about the cocaine or that the marijuana butts, hypodermic needles, and pills were not in plain view in the living room when Officers Greene and Crawley arrived. * * * But neither factual proposition is disputed; there is only uncertainty about whether David consented to a search of the bedroom and whether additional material from the bedroom was taken to the living room by the police before they procured the warrant. Because the validity of the warrant does not depend on material that might have been found in the bedroom, the defense is not prejudiced by the unavailability of David and therefore by the preindictment delay.

Finally, we note that the claim of prejudice in this case does not relate to the loss of evidence that might have tended to establish petitioner's innocence of the offense with which he was charged, but rather to an alleged impairment of the ability to block the introduction of evidence demonstrating petitioner's guilt. We question whether a due process claim of prejudicial pre-indictment delay is available at all where the prejudice related only to the litigation of a suppression motion (cf. *McCray* v. *Illinois*, 386 U.S. 300); even if it is, it surely must be confined to the extraordinary case in which the delay is designed to prejudice the defendant's ability to obtain

suppression of evidence, and not to cases such as this, in which the delay was concededly not the product of deliberate or even negligent misconduct by the federal prosecutor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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